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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 657

KANSAS CITY SOUTHERN RAILWAY CO.,
Petitioner,

vs.

PAUL JOHNSTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

RESPONDENT'S OBJECTIONS TO THE JURISDICTION OF THE COURT

Respondent objects to the jurisdiction of the court to grant a writ of certiorari for the reason that said petition was not filed within ninety days as required by Title 28, U.S.C.A., Sec. 2101(c). The court, accordingly, has no jurisdiction to review on certiorari the merits of the judgment entered in this case.

STATEMENT OF FACTS

As demonstrated by respondent's Appendix "A", the petition for certiorari in this case was filed on September 27, 1967. The judgment was entered in the Supreme Court of Oklahoma on May 29, 1967. A petition for rehearing was denied on June 27, 1967 (Petitioner's Appendix, p. 48). The petitioner then filed an Application for Leave to File Second Petition for Rehearing (Petitioner's Appendix, p. 49). Endorsed on this application was the statement "Leave is hereby granted to file this 29 day of June, 1967. Floyd L. Jackson, Chief Justice." (Petitioner's Appendix, p. 50). The petitioner's second petition for rehearing is not set out in the petitioner's appendix. The court denied the petitioner's second petition for rehearing summarily on July 18, 1967.

It is respondent's contention that since the petitioner's second petition for rehearing was not actually entertained by the court, the time within which application may be made for certiorari began to run from June 27, 1967, the date the first petition was denied. The statutory period prescribed by Title 28, U.S.C.A., Sec. 2101(c), thus expired on September 25, 1967.

The petition for certiorari filed in this case was therefore filed two days late and by reason thereof, this court does not have jurisdiction.

ARGUMENT AND AUTHORITIES

The law governing disposition of respondent's objections to the jurisdiction of the court has been stated as follows:

> "The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing. *Morse* v. *United States*, 270 U.S. 151, 46 S. Ct. 241, 70 L. Ed. 518.
>
> "If, however, a timely motion for leave to file the second petition is granted *and the petition is actually entertained* by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition."
>
> *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498, 48 S. Ct. 112, 87 L. Ed. 151.
>
> See also *Department of Banking, etc.*, v. *Pink*, 317 U.S. 264, 63 S. Ct. 233, 87 L. Ed. 254.

It is respondent's contention that the petitioner's second petition for rehearing was never entertained by the Oklahoma court.

> "As a general rule, the determination by the Appellate Court of an application or petition for a rehearing in favor of the petitioner ordinarily results *in an order granting a hearing which entitles the petitioner to a reargument and submission* with respect to the error for which the rehearing was granted."
>
> 5 C.J.S., Appeal and Error, Sec. 1445, p. 568.

The foregoing general rule in substance has been incorporated in the Rules of the Supreme Court of Oklahoma as follows:

"28. REHEARINGS: (1) Applications for a rehearing in any cause, unless otherwise ordered by the Court, shall be made by petition to the Court, signed by counsel, and filed with the Clerk, within fifteen (15) days from the date on which the opinion in the cause is filed. No oral argument on petition for rehearing shall be allowed except upon order of the Court. No motion or application for rehearing or review will be allowed after the denial of a petition for rehearing without leave of Court. The Clerk shall not file any such motion or application except by leave of the Court first obtained. No petition for rehearing shall be filed or considered without proof of service.

"(2) Ten (10) clearly legible copies of petitions for rehearing shall be filed. If such petitions are typewritten, two original copies with four carbon copies of each original shall be filed.

"29. APPLICATION FOR SECOND PETITION FOR REHEARING: (1) Within five (5) days after a petition for rehearing is denied an application for a second petition for rehearing may be made but not filed except by leave of Court. Such application shall have attached thereto a petition for rehearing and a brief in support thereof.

"(2) Ten (10) copies of such application, petition for rehearing, and brief are required, as provided in Rule 28 (2) supra.

"30. RESPONSE TO PETITION FOR REHEARING: *It is not necessary to respond to a petition for rehearing unless requested to do so by the Court.* This must not be confused with responding to a motion to dismiss. (See Rule 9.)"

Thus, if the Oklahoma Court had entertained the second petition for rehearing, it would have issued an order granting the hearing and instructed the respondent to file a reply to the petition in accordance with Rule 30 quoted above.

The foregoing rule is also in accord with the general law on the subject.

> "Ordinarily the Appellate Court will not *entertain* a second application for a rehearing * * *."
> 5 C.J.S., Appeal and Error, Sec. 1442, p. 564.

Respondent submits that petitioner's second petition for rehearing, which is not even contained in petitioner's appendix herein, was not entertained by the Oklahoma Court. Thus, this petition was not timely filed and this petition should be dismissed. There is the further tacit admission by the petitioner that September 25, 1967, was the deadline for its petition as demonstrated by its application for an extension of time to perfect this appeal by certiorari, from August 29, 1967, to September 25, 1967 (Petitioner's Appendix, p. 55).

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Oklahoma (Petitioner's Appendix, pp. 14 to 41) is reported at 429 P.2d 720.

JURISDICTION

Respondent contends that the court does not have jurisdiction of this cause for the reasons stated in respondent's objections to the court's jurisdiction. In the event that the court disposes of this contention adversely to respondent, then respondent will admit the court has jurisdiction to review this case by certiorari pursuant to Title 28, U.S.C.A., Sec. 2101(c), and Title 28, U.S.C.A., Sec. 1257(3), in that this case involves rights afforded the parties by a federal statute; namely, the Federal Employers Liability Act and the Safety Appliance Act, Title 45, U.S.C.A., Sec. 1, et seq.

Inasmuch as the court has plenary power to review cases under the foregoing federal statutes, it should not be necessary to consider petitioner's contentions concerning application of the Fourteenth Amendment and the Seventh Amendment to the Constitution of the United States or the provisions of the Oklahoma State Constitution.

QUESTIONS PRESENTED

1. Does a state trial court have the power to direct a verdict under the Federal Employers Liability Act and the Safety Appliance Act?

2. Does the Seventh Amendment and Fourteenth Amendment of the Constitution of the United States guarantee litigants the right of a jury trial in an action filed under the above mentioned acts?

3. Did the Supreme Court of the State of Oklahoma decide this case in accordance with the decisions of this court construing the above mentioned acts?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 45, U.S.C.A., Sec. 2 (Petitioner's Appendix, p. 5); Title 45, U.S.C.A., Sec. 53 (Petitioner's Appendix, p. 6).

Respondent contends the remaining statutes cited by the petitioner are not applicable to this proceeding.

STATEMENT OF CASE

Plaintiff brought this action against defendant railroad in the District Court of LeFlore County, State of Oklahoma, alleging a violation of Title 45, U.S.C.A., Sec. 2 of the Safety Appliance Acts.

Plaintiff's petition (Petitioner's Appendix, p. 7), made it clear that he was relying solely on defendant's breach of the foregoing statute in support of his right to recover damages. Disregarding the allegations of plaintiff's petition, defendant's initial answer alleged it was in "nowise negligent in the operation of this train * * * that it was due to an unavoidable casualty * * * that it was confronted with a sudden emergency * * *."

Defendant continued to perpetuate this confusion until the trial court, in response to plaintiff's motion, struck paragraphs 4 and 5 of defendant's answer (Petitioner's Appendix, pp. 13-14), containing the above mentioned negligence concepts. Defendant was permitted to amend its answer alleging that the couplers referred to in plaintiff's petition were the same kind as used in the railroad industry (Petitioner's Appendix, p. 14).

The issues as thus joined indicated that plaintiff had elected to rely solely upon a breach of the Safety Appli-

ance Act, Title 45, U.S.C.A., Sec. 2, rather than negligence under Title 45, U.S.C.A., Sec. 51. Petitioner tacitly agrees that the foregoing statement reflects the issues in the case as tried (Petitioner's Appendix, p. 6).

An examination of the defendant's answer and its amended answer (Petitioner's Appendix, pp. 9-14), indicates that contributory negligence was not pleaded and the affirmative defenses of unavoidable accident and emergency doctrine were stricken. Under the procedural requirements of Oklahoma law:

> "* * * Defenses which assume or admit original cause of action but are based on subsequent facts or transactions which operate to qualify or defeat it must be pleaded, *and unless so pleaded are deemed waived.*" *Craft* v. *Bates*, Okl., 372 P.2d 10 (1962).

The sole issues in this case as derived from the pleading may then be summarized as follows:

Plaintiff alleged that defendant's train after being securely coupled became uncoupled in an ordinary train movement as it proceeded down Rich Mountain (Petitioner's Appendix, pp. 8, 9); all of which constituted a breach of Title 45, U.S.C.A., Sec. 2 of the Safety Appliance Acts. Plaintiff further alleged that defendant's breach of the foregoing act caused in whole or in part plaintiff's injuries and damages.

In response to the foregoing allegation, the only defense ultimately pleaded by the defendant was a general denial (Petitioner's Appendix, p. 9) and a denial that Title 45, U.S.C.A., Sec. 2, applied to the case.

Plaintiff's evidence established that defendant's train became uncoupled at a point approximately 30 cars ahead of the caboose while the train was traveling about 40 to 45 miles per hour, in an ordinary train movement (C.M.

91 to 100). Defendant's evidence did not dispute the foregoing facts. Defendant's sole evidence on the issue of liability consisted of the testimony of Lonnie R. Malone, defendant's car foreman. To demonstrate the total insufficiency of defendant's evidence, respondent has abstracted the testimony of this witness in respondent's Appendix B.

ARGUMENT AND AUTHORITIES IN OPPOSITION TO THE GRANT OF CERTIORARI

I.

A state court has the power to direct a verdict in a Safety Appliance Act case in accordance with federal law and state rules of civil procedure as long as the observance of such state rules does not determine the incidents of substantive federal rights granted litigants under the Act.

This court has long adhered to the following rule in reviewing FELA cases filed in state courts:

> "When the evidence is such that without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, *directed verdict* or otherwise in accordance with *applicable practice* without submission to the jury * * *."
>
> *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 239.

The Oklahoma trial court applied its customary procedural rules in ruling upon plaintiff's motion for a directed verdict.

> "While usually the question of proximate cause is one of fact for the jury, when the facts are such that the judge can conclude that reasonable men could not differ in their conclusion, he will pass upon it as a ques-

tion of law. Since the evidence would not justify a conclusion stronger than we have recited, we hold as a matter of law that under the evidence the negligence of the defendant was the proximate cause of the harm."

Lone Star Gas Co. v. *Parsons*, 159 Okl. 52, 14 P.2d 369.

The Supreme Court of Oklahoma affirmed the trial court's ruling on the motion for directed verdict, stating:

"If the evidence connecting the brakeman's death with the train's separation was purely circumstantial, that was reason enough (aside from the question of the railroad company's responsibility for the train's coming apart) for submitting that case (*Gotschall* v. *Minneapolis & St. L. R. Co.*, Minn., 153 NW 120) to a jury. But, here, that is not the situation. Here there is no question, or issue, of plaintiff having been injured as a result of the separation of Extra 102 North. *This was proved by uncontradicted, direct evidence, and was not merely a matter that might, or might not, be reasonably inferred from circumstantial evidence by a jury.*

"Nor was there any question, or issue, here of defendant's liability to be submitted to the jury because of different conclusions that might have been drawn from the evidence as to the cause of the coupler's failure to hold, or remain closed, at all times after the train left North Switch." (Petitioner's Appendix, p. 24).

The cases are legion wherein this court has refused to review the action of a state trial court, or Appellate Court, in directing a verdict. A representative list of such cases can be cited as follows:

Killian v. *Penn. R. Co.*, 338 U.S. 819, 70 S. Ct. 63, 94 L. Ed. 497;

Lavender v. *Illinois Central R. Co.*, 338 U.S. 822, 70 S. Ct. 67, 94 L. Ed. 499;

Roberts v. *Alabama Great Southern R. Co.*, 340 U.S. 829, 71 S. Ct. 66, 95 L. Ed. 609;

Emmick v. *Baltimore & Ohio R. Co.*, 340 U.S. 831, 71 S. Ct. 43, 95 L. Ed. 611;

Roberts v. *MKT R. R. Co.*, 340 U.S. 832, 71 S. Ct. 54, 95 L. Ed. 611;

Gentry v. *Seaboard Air Line R. Co.*, 340 U.S. 853, 71 S. Ct. 82, 95 L. Ed. 625;

Moleton v. *Union Pacific R. Co.*, 340 U.S. 932, 71 S. Ct. 495;

Ottley v. *St. Louis San Francisco R. Co.*, 340 U.S. 948, 71 S. Ct. 533, 95 L. Ed. 683;

Jaroszewski v. *Central R. Co.*, 344 U.S. 839, 73 S. Ct. 26, 97 L. Ed. 653;

Creamer v. *Ogden Union R. & Depot Co.*, 344 U.S. 912, 73 S. Ct. 333, 97 L. Ed. 703;

Shellhamer v. *Lehigh Valley R. Co.*, 347 U.S. 990, 74 S. Ct. 852, 98 L. Ed. 1124;

Keiper v. *Northwestern Pacific R. Co.*, 350 U.S. 948, 76 S. Ct. 323, 100 L. Ed. 826;

Click v. *Jacksonville Terminal Co.*, 350 U.S. 994, 76 S. Ct. 543, 100 L. Ed. 859;

Bennett v. *Southern R. Co.*, 353 U.S. 958, 77 S. Ct. 865, 1 L. Ed. 2d 909.

A long list of earlier cases can be found in the appendix to *Wilkerson* v. *McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

Petitioner presents the novel argument without citation of any federal authority that even though this case was tried solely on the basis of a breach of the Safety Appliance Acts, Title 45, U.S.C.A., Sec. 2, the Constitution of the State of Oklahoma requires that the issue of contributory negligence be submitted to a jury. Counsel for the petitioner appears to have forgotten that petitioner did not allege contributory negligence in its answer nor did petitioner raise this issue at the pre-trial conference. The

Supreme Court of Oklahoma noted this apparent forgetfulness by stating:

> "We are not certain what counsel means by this statement that defendant was deprived of 'setting up' contributory negligence. If counsel means that defendant was deprived of pleading contributory negligence, the *record does not reflect this because it fails to show that defendant ever attempted to plead contributory negligence.*" (Petitioner's Appendix, p. 28).

It is further well established that:

> "Proof of violation of certain safety appliance statutes without more * * * eliminates contributory negligence as a consideration for any purpose."
>
> Note 13, *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493, Title 45, U.S.C.A., Sec. 53.

Since contributory negligence never was an issue in this case, the provision of the Oklahoma Constitution could have no possible relevance.

II.

Neither the Seventh Amendment nor the Fourteenth Amendment of the Constitution of the United States guarantees the litigants a right to a jury trial under the Federal Employers Liability Act or the Safety Appliance Acts.

The foregoing constitutional amendments are not applicable to this proceeding.

> "* * * A state need not provide in FELA cases any trial by jury according to the requirements of the Seventh Amendment. *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961."
>
> *Brady* v. *Southern Ry. Co.*, supra.

There is nothing in the laws or rules of the Oklahoma court which discriminates in any way between cases arising under state law and cases arising under the Federal Employers Liability Act.

III.

The Oklahoma Supreme Court has decided this case in accordance with federal decisions construing the Safety Appliance Acts, Title 45, U.S.C.A., Sec. 2.

The trial court and the Supreme Court of Oklahoma correctly applied the rule of law set forth in *O'Donnell* v. *Elgin, Joliet & E. R. Co.*, 338 U.S. 384, 70 S. Ct. 200, 94 L. Ed. 187, to the facts of this case as demonstrated by the following opinion of that court:

> "'The Safety Appliance Act (42 U.S.C.A., Sec. 2), which makes it unlawful for a common carrier engaged in interstate commerce to use cars "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the end of the car", requires couples which, after a secure coupling is effected, *will remain coupled* until set free by some purposeful act of control.' (Emphasis added).
>
> "In the process of reaching its announced conclusion in the O'Donnell Case that, as to a claim based on the Safety Appliance Act (as Johnston's petition in this case shows his is—without any allegation of negligence) the plaintiff is 'entitled to a preemptory instruction' that, to equip a car with a coupler that breaks, is a violation of the Act, which renders the defendant railroad liable for injuries approximately resulting therefrom, the court said:
>
> "'A defendant cannot escape liability for a coupler's inadequacy by showing that too much was demanded of it, nor by showing that while the coupler broke it had been properly manufactured, diligently inspected

and showed no visible defects. These circumstances do go to the question of negligence; but, even if a railroad should explain away its negligence, that is not enough to explain away its liability if it has violated the Act.'

"In a footnote to the quoted statement, the Court also said:

" 'We do not say that a railroad may never effectively defend under the Act my showing that an adequate coupler failed to hold because it was broken or released through intervening and independent causes other than its inadequacy or defectiveness; such, for example, as the work of a saboteur. * * *.'

"Defendant seizes upon the quoted language in the footnote to support its position that the testimony of the witnesses, Ray, Duncan and Malone, above referred to, was sufficient evidence that the couplers in this case failed to remain coupled because of causes independent of, or aside from any inadequacy, or defectiveness, in them. The testimony referred to was not to the effect that the couplers in this case failed to remain coupled because of any circumstance mentioned in said testimony that might possibly cause a failure. That testimony merely indicated some of the things that *could* cause couplers to open, or come uncoupled, or had been learned to have caused uncoupling in other instances. There was no evidence that any such thing *did happen in this case.* In this, it differs from *New York C. & St. R.R. Co.* v. *Affolder,* (U.S.C.A., 8th) 174 F.2d 486, in which there was evidence of the actual existence of more than one situation which could have caused the Pennsylvania car and the Rock Island car not to couple. It also differs from *Carter* v. *Atlantic & St. A.B.R. Co.*, 338 U.S. 430, 70 S. Ct. 226, 94 L. Ed. 236, in which there was a question of fact as to the causal relationship, or intervening cause, between the L & N car's failure to couple and the plaintiff's injury from pulpwood in its hold being pitched forward on him, when the switching train later coupled with it.

Under the decisions of the Federal Courts and the United States Supreme Court, the failure of the subject couplers on Extra 102 North to remain coupled as this train proceeded down Rich Mountain from North Switch was just as adequate proof of defendant's railroad's violation of the Safety Appliance Act as such couplers' failure to couple automatically by impact has been held to be in other cases. In this connection see *Cobb* v. *Union Railway Company*, 318 F.2d 33.'"

The petitioner argues in its proposition (2) that respondent's pleadings alleged a violation of the Safety Appliance Act, Title 45, U.S.C.A., Sec. 2 and a negligence charge under the Federal Employers Liability Act, Title 45, U.S.C.A., Sec. 51. Respondent's petition clearly set out that he was proceeding solely on the theory that the petitioner had breached one section of the Safety Appliance Act as demonstrated by that portion of respondent's petition which reads as follows:

"PLAINTIFF'S PETITION, PARAGRAPHS IV and V

IV.

"This suit and cause of action is brought pursuant to the Safety Appliance Act, Title 45, U.S.C.A., Sec. 2; to-wit:

"'It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.'

V.

"Pursuant to the foregoing statute and the decisions of the United States Supreme Court, the defendant, at all times mentioned herein, had the absolute duty to haul or use on its line cars equipped with couplers which, after a secure coupling was effected, would remain coupled until set free by some purposeful act of control." Petitioner's Appendix B, p. 7.

Petitioner in its argument under its propositions (3) and (4), p. 11 of its petition, cites dissenting opinions of this court with the apparent purpose of persuading the court to overrule *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, supra.

The foregoing landmark case clarified many prior decisions relative to the construction of the Safety Appliance Acts. The petitioner complains of its burden in defending cases filed under the Safety Appliance Act. It should be pointed out that the foregoing acts concern only a few major appurtenances of a railroad car. Certainly one of the most important mechanisms of a railroad car is its couplers. A coupler when securely coupled but which becomes uncoupled in an ordinary train movement, presents a great hazard to the employees of the railroad as well as the general public. By reason of the Safety Appliance Act, railroads have established a system of inspection wherein those appliances covered by the Act are given top priority. It was the intention of Congress, in passing the Safety Appliance Act, to exact a high degree of vigilance from the carriers in the inspection and maintenance of those appurtenances described in the Act.

CONCLUSION

Respondent contends that the petitioner has had its day in court and the proper federal law has been applied. Respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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